Supreme Court, U.S.
FILED
SEP 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-169

In the Supreme Court of the United States

OCTOBER TERM, 1986

HAROLD J. DES VIGNES, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The judgment of the court of appeals in this civil action was entered on May 2, 1986 (Pet. App. B2). Therefore, in the absence of a timely petition for rehearing, the time provided by 28 U.S.C. 2101 within which to file a petition for a writ of certiorari expired on July 31 (see Rule 20.4 of the Rules of this Court). The petition was filed on August 1.[1]

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[1]Rule 28.2 of the Rules of this Court provides that a petition is deemed timely filed if it was deposited in the mails within the time allowed for filing, but petitioner did not file a notarized statement by a member of the Bar of this Court that would entitle him to invoke Rule 28.2.

Petitioner filed two applications in the court below after it issued its judgment, but neither extended the time for filing a petition for a writ of certiorari. On May 14 petitioner filed an "Application to Stay Mandate Pending Certiorari Consideration" (see Pet. App. C2), but did not seek rehearing of the court's judgment (see *id.* at C3). Therefore, the stay application did not extend the time for filing a petition for a writ of certiorari.[2] Petitioner also filed an "Application to Stay Mandate of Federal Circuit Court of Appeals Pending Determination of Petitioner's Application for a Rehearing In Banc and Petition for a Rehearing In Banc" on May 29. Perhaps mindful that the time for seeking rehearing of the court's judgment had expired (see Fed. R. App. P. 40a), petitioner expressly limited his request to seeking rehearing en banc of his stay application of May 14. Therefore, this application, which was denied the day after it was filed, did not extend the time for filing a petition for a writ of certiorari.[3]

Accordingly, the time provided by 28 U.S.C. 2101(c) within which to file a petition for a writ of certiorari expired on July 31 and the petition filed on August 1 was out of

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[2]Although the May 27 order of the court of appeals denying the stay application stated that the court's original order was "reaffirmed" (Pet. App. C3), "the court did no more by the second judgment than to restate what it had decided by the first one," *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952), so the May 27 order did not extend the time for filing a petition for a writ of certiorari. R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 314-315 (6th ed. 1986).

[3]Even if petitioner had filed a petition seeking rehearing of the court's judgment on May 29, that would not have extended the time within which to file a petition for a writ of certiorari because only a "timely filed" petition for rehearing extends that time period (see Rule 20.4 of the Rules of this Court).

time. The time limit provided in 28 U.S.C. 2101(c) is jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

SEPTEMBER 1986

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[4]In any event, the issue petitioner seeks to present is insubstantial. Petitioner, a former air traffic controller who was fired for participating in an illegal strike in August 1981, argues that the court below erred in imposing a sanction of $1,000 upon his counsel pursuant to Fed. R. App. P. 38 for pursuing a frivolous appeal. This Court recently denied petitions for writs of certiorari in two similar cases, which petitioner does not attempt to distinguish. *Russell* v. *Department of Transportation, FAA*, No. 85-1229 (denied June 2, 1986); *Robinson* v. *Department of Transportation, FAA*, No. 85-951 (denied March 10, 1986).